

1988

Ronald Draughon v. Cuna Mutual Insurance Society : Brief of Appellant

Utah Supreme Court

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BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

RONALD DRAUGHON,

Plaintiff-Appellant,

v.

Case No. 870174

CUNA MUTUAL INSURANCE
SOCIETY,

14b

Defendant-Respondent.

BRIEF OF APPELLANT

AN APPEAL FROM THE
FOURTH JUDICIAL DISTRICT COURT OF DAVIS COUNTY
THE HONORABLE DOUGLAS L. CORNABY, PRESIDING

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STATEMENT OF JURISDICTION AND NATURE OF PROCEEDINGS BELOW

Jurisdiction to hear this appeal is conferred upon the Court by Utah Code Anno. § 78-2-2(3)(i)(1986).

The pertinent proceedings below include only the parties' cross motions for summary judgment heard before the Honorable Douglas L. Cornaby on March 31, 1987. Judge Cornaby took the Motions under advisement and entered a written ruling on April 9, 1987, granting defendant's Motion for Summary Judgment and denying plaintiff's Motion for Summary Judgment.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The following issues are presented for review:

I. Whether Judge Cornaby erred in not finding the meaning of the phrase "material contributing cause" ambiguous.

II. Whether Judge Cornaby erred in applying an

Oregon judicial interpretation of the phrase "material contributing cause" to the facts of the case.

III. Whether, if the Oregon judicial interpretation is applicable, Judge Cornaby erred in his construction and application of that interpretation.

IV. Whether Judge Cornaby erred in concluding that, as a matter of law, Sandra Draughon's kidney disease was a "material contributing cause" of her death.

V. Whether Judge Cornaby erred in effectively rewriting the contract of the parties.

STATEMENT OF THE CASE

In October of 1985, Ronald Draughon and his wife, Sandra Draughon, entered into a loan agreement under which they borrowed funds from America First Credit Union to purchase an automobile. Pursuant to the loan agreement, America First Credit Union obtained credit life insurance from defendant CUNA Mutual Insurance Society ("CUNA") for the benefit of Mr. and Mrs. Draughon.

Mrs. Draughon suffered from kidney disease first diagnosed in 1982. Although her condition was successfully treated with maintenance hemodialysis, in November of 1985

Mrs. Draughon elected to undergo a kidney transplant operation. The operation was successfully performed on November 21, 1985.

Mrs. Draughon soon developed acute pancreatitis, a rare and unforeseen complication of the immunosuppressive treatment she received following the operation. The pancreatitis caused internal abdominal infections and, eventually, cardiac arrest leading to Mrs. Draughon's death.

A claim was submitted to CUNA and denied based on CUNA's assertion that Mrs. Draughon's death came under the "risks not assumed" clause. Disputing CUNA's reading of the clause, on June 13, 1986, Mr. Draughon filed suit in the Fourth Judicial District Court of Davis County seeking a judgment construing the "risks not assumed" clause in his favor and requiring CUNA to pay the claim submitted.

On March 31, 1987, both Mr. Draughon and CUNA brought summary judgment motions for hearing before the Honorable Douglas L. Cornaby. In a written Ruling dated April 9, 1987, Judge Cornaby denied Mr. Draughon's Motion and granted CUNA's Motion concluding that no issues of material fact existed, that the phrase "material contributing cause" should be interpreted in accordance with a 1986 Court of Appeals of Oregon case, that in light of this interpretation Mrs. Draughon's kidney disease was a "material contributing cause"

of her death and that, therefore, Mr. Draughon's claim was properly denied. Judgment in favor of defendant was entered on May 5, 1987.

STATEMENT OF FACTS

On or about October 29, 1985, plaintiff Ron Draughon and his wife Sandra Draughon entered into a loan agreement under which they borrowed funds to purchase an automobile through America First Credit Union of Ogden.¹ As part of the transaction, America First Credit Union obtained credit life insurance from defendant CUNA for the benefit of Mr. and Mrs. Draughon.² Subject to certain conditions and exclusions, the credit life insurance contract obligated CUNA to pay the balance due on the auto loan in the event of Mr. or Mrs. Draughon's death.

Mrs. Draughon suffered from kidney disease first diagnosed in September of 1982. Her condition was successfully treated with maintenance hemodialysis, and she led a normal, productive life.³ She maintained full employment while raising two young children. Continuing the hemodialysis treatments, she was expected to live another

¹ Ruling on Motion for Summary Judgment at 1 (R. 87).

² Id.

³ Id.

twenty to thirty years.⁴

In November of 1985, Mrs. Draughon elected to undergo a kidney transplant operation. The operation was successfully performed on November 21, 1985.⁵ Soon thereafter, Mrs. Draughon developed acute pancreatitis, a rare and unforeseen complication of the immunosuppressive drugs she was given to help prevent rejection of the transplanted organ.⁶ The immunosuppressive drugs caused inflammation and hemorrhaging of the pancreas which led to internal abdominal infection, cardiac arrest and Mrs. Draughon's death on February 7, 1986.⁷ As stated by her physician Dr. Wayne Border, "in no sense was the cause of [her] death related to her underlying renal [kidney] disease."⁸

Soon after Mrs. Draughon's death, Mr. Draughon submitted the claim under the credit life insurance contract. CUNA denied the claim based on its assertion that the "risks not assumed" clause of the contract applied to Mrs. Draughon's

⁴ Deposition Transcript of Wayne A. Border, M.D. at 31.

⁵ Affidavit of Dr. Wayne A. Border ¶ 6 (R. 16).

⁶ Deposition Transcript of Wayne A. Border, M.D. at 28.

⁷ Id. at 27.

⁸ Deposition Transcript of Wayne A. Border, M.D., Deposition Exhibit 2, at 2.

death.⁹ In relevant part, the clause reads:

CUNA Mutual does not assume the risk and no benefit is provided for any loss if any material contributing cause of loss was from sickness or injury which first became manifest prior to the time insurance coverage was otherwise effective under the contract.¹⁰

Specifically, CUNA contended that Mrs. Draughon's kidney disease, admittedly manifest prior to the effective date of the contract, was a "material contributing cause" of her death.

Prior to Judge Cornaby's April 9, 1987 Ruling disposing of this matter, the meaning of the phrase "material contributing cause" was addressed by no Court other than the Courts of the State of Oregon. In Oregon, the phrase is applied in a specific factual context common to certain workers compensation disputes. The phrase is not defined in the insurance contract in which it is found and Judge Cornaby did not define it in his April 9 Ruling.

SUMMARY OF ARGUMENT

Resolution of this matter involved two tasks: interpretation of the phrase "material contributing cause," (hereinafter sometimes referred to as "the phrase") and application of that interpretation to the facts. In carrying

⁹ Ruling on Motion for Summary Judgment at 2 (R. 88).

¹⁰ Id.

out these tasks, Judge Cornaby erred in several respects.

First, the phrase is not defined in the insurance contract, has no ordinary meaning and lacks a relevant judicial interpretation. Therefore, it should have been found ambiguous and construed strictly against CUNA. Mr. Draughon presented a construction favorable to his position and urged Judge Cornaby to adopt it. Judge Cornaby erred in failing to do so.

Second, the only judicial interpretation of the phrase, that of the courts of Oregon, was developed and is applied in a legal and factual context incompatible with those of the present matter. For that reason, and because the parties did not intend to be bound by the Oregon interpretation, it is inapplicable. Judge Cornaby's reliance on the Oregon interpretation was, therefore, error.

Finally, assuming the applicability of the Oregon interpretation, Mrs. Draughon's kidney disease was not a "material contributing cause" of her death under that interpretation. In reaching the opposite result, Judge Cornaby overlooked the key element of proof required by the Oregon courts to establish "material contributing cause," a medical causal link between the original and subsequent injuries. Therefore, although ostensibly applying the Oregon interpretation of the phrase, Judge Cornaby misconstrued that

interpretation and, in doing so, committed error.

ARGUMENT

The review standard applicable to this appeal was set forth in Automotive Manufacturers Warehouse, Inc., v. Service Auto Parts, Inc., 596 P.2d 1033 (Utah 1979). In Automotive Manufacturers the trial court granted summary judgment in favor of plaintiff based on its interpretation of certain language found in a security agreement. Defendant assigned error to the trial court's interpretation. Upon review, this court stated:

The narrow question we are called upon to answer is whether by co-signing a security agreement with the provisions as indicated supra, one becomes a guarantor of the principle. We must, therefore, interpret the language of the documents drafted by plaintiff and signed by the parties in 1972. Where the issue involved is solely one of law, as in the instant case, this court is capable of determining the question as was the trial court and we are not bound by its conclusions.

Id. at 1036.

Likewise, the central issue involved in this appeal is solely one of law. The court must interpret the language of an insurance policy drafted by CUNA. Judge Cornaby's conclusions are not binding and, as argued below, should be given no deference.

POINT I

THE PROPER INTERPRETATION OF
THE PHRASE "MATERIAL
CONTRIBUTING CAUSE" EMPLOYS
PROXIMATE CAUSE PRINCIPLES.

Resolution of this matter involves, first, the interpretation of the phrase "material contributing cause." The phrase appears in an exclusionary clause of the insurance contract of the parties. As noted above, the clause reads:

CUNA Mutual does not assume the risk and no benefit is provided for any loss if any material contributing cause of loss was from sickness or injury which first became manifest prior to the time insurance coverage was otherwise effective under the contract.¹¹

In rejecting Mr. Draughon's claim, CUNA stated that Mrs. Draughon's kidney disease, first manifest prior to coverage, was a "material contributing cause" of her death.

A. The Phrase Should be Defined Employing Proximate Cause Principles.

Mr. Draughon argued below, and urges on appeal, that the phrase "material contributing cause" should be interpreted and applied employing proximate cause principles. Several reasons exist for equating "material contributing cause" with proximate cause. First, the only judicial interpretations of the phrase "material contributing cause," those of the courts

¹¹ Ruling on Motion for Summary Judgment at 2 (R. 88).

of Oregon, define and apply it employing terminology and concepts borrowed from the doctrine of proximate cause.¹² Second, the doctrine is the standard for determining cause most familiar to the judiciary. Finally, the use of proximate cause as the equivalent of "material contributing cause" will allow this court to apply the objective, conceptual parameters it developed to determine proximate cause. Use of the "material contributing cause" standard will suffer from the lack of such an objective, conceptual basis for decision.

B. Equating "Material Contributing Cause" with Proximate Cause, Kidney Disease was not a "Material Contributing Cause" of Mrs. Draughon's Death.

To restate, the central issue is whether Mrs. Draughon's kidney disease, her only sickness or injury manifest prior to coverage, was a "material contributing cause" of her death. Employing proximate cause principles, the issue becomes whether Mrs. Draughon's kidney disease was a cause "which in natural and continuous sequence, unbroken by an efficient intervening cause, produces [her death] and without which the

¹² In the context of worker's compensation claims, an older, compensated injury is a "material contributing cause" of a present condition only if there is no "intervening and superceding cause of [the present] condition." Manous v. Argonaut Insurance, 79 Or. App. 645, 719 P.2d 1318, 1320 (1986). See Memorandum in Support of Motion for Summary Judgment against CUNA Mutual Insurance Society at 4 (R.21).

result would not have occurred."."13 Examining each part of the test individually, it is apparent that the issue should be decided in favor of Mr. Draughon.

First, to be a proximate cause (and by interpretation, a "material contributing cause"), Mrs. Draughon's kidney disease must have produced her death in a natural and continuous sequence, unbroken by an efficient intervening cause. The sequence of events that actually occurred from the time Mrs. Draughon's kidney disease was first diagnosed until her death were not natural, continuous or unbroken. Whether one defines "natural" in terms of probability or in terms of foreseeability, the pancreatitis that caused Mrs. Draughon's death was not a part of the "natural" sequence because, as both the doctors for Mr. Draughon and CUNA agree, it was an improbable, not reasonably foreseeable complication of her transplantation.¹⁴

That the sequence of events was not "continuous" but was in fact "broken" is apparent. The prognosis for Mrs. Draughon's kidney disease prior to her election to undergo a transplantation was good. Continuing her hemodialysis treatments, she was expected to live another twenty to thirty

¹³ Mitchell v. Pearson Enterprises, 697 P.2d 240, 245 (Utah 1985).

¹⁴ See Affidavit of Dr. Wayne A. Border at 2 (R.16), and Affidavit of Dr. Robert E. Bond at 2 (R.49).

years.¹⁵ Mrs. Draughon's election to undergo a transplantation not only interrupted but completely ended the natural and continuous progression of her kidney disease.

Finally, an efficient intervening cause, in fact that the sole cause, as agreed by both doctors for Mr. Draughon and CUNA, broke any "chain of causation" that may have existed. The efficient cause is "one that necessarily sets in operation the factors that accomplish the injury."¹⁶ Dr. Border, Mrs. Draughon's physician, explained how her pancreatitis developed and set in operation the factors that led to her death:

In my view the initial event would have been the damage to the pancreas by the steroid, the prednisone drug she was taking, and that caused pancreatitis; that is, inflammation of the pancreas; the pancreas cells now begin to leak their contents, which are enzymes, which are like acid, they begin to eat other tissues, and the pancreas literally begins to dissolve itself, and that's the condition we call acute pancreatitis that is associated with nausea, vomiting, back pain and other conditions.

Now, that can be reversible, or if it progresses, as in her case, the release of these harmful substances from the pancreas continues to literally dissolve the pancreas and then begins to erode through these tissues, and then it begins

¹⁵ Deposition transcript of Wayne A. Border, M.D., at 31.

¹⁶ Mitchell v. Pearson Enterprises, 697 P.2d at 245.

to hemorrhage, so that suddenly the whole pancreas has turned into a huge area of dead and hemorrhagic tissues, and now that becomes infected so that we now are back--we've now gone back to the infections that she has.

The retroperitoneal hemorrhage is the dissection of the blood and the pancreatic contents into other parts of the back; the areas surrounding the pancreas; and now you have a life threatening condition, and the--obviously the low blood pressure and the metabolic acidosis are all terminal events resulting in cardiac arrest.¹⁷

Dr. Border's description of the terminal sequence of events makes apparent that the efficient cause of Mrs. Draughon's death was her pancreatitis. Therefore, Mrs. Draughon's kidney disease cannot be termed a proximate cause of her death. Instead, it is an event that Couch on Insurance refers to as an "antecedent contributing circumstance." Section 74.717 states:

An antecedent contributing circumstance is generally ignored in determining the proximate cause. That is to say, a situation which merely sets the stage for the later event is not regarded as being the proximate cause merely because it made possible the subsequent loss. For example, the explosion of gas, and not the lighting of a match, is the proximate cause of loss where the explosion is caused by the lighting of a match in a room filled with gas.¹⁸

¹⁷ Deposition transcript of Dr. Wayne A. Border at 31.

¹⁸ Couch on Insurance 2d at 1024 (Rev. ed.).

Mrs. Draughon's kidney disease and transplantation were events or circumstances that "merely set the stage" for the later terminal events identified by Dr. Border. The kidney disease in particular, the only "sickness or injury which first became manifest prior to the time insurance coverage was otherwise effective under the contract,"¹⁹ was not a proximate cause and, by interpretation, not a "material contributing cause" of her death. Plaintiff assigns error to Judge Cornaby's failure to so hold.

POINT II

THE TRIAL COURT ERRED IN ITS INTERPRETATION OF THE PHRASE "MATERIAL CONTRIBUTING CAUSE."

Resolution of the ultimate issue below, whether Sandra Draughon's kidney disease was a "material contributing cause" of her death, required Judge Cornaby to first define the phrase "material contributing cause." The difficulty of this task was compounded by three factors: the phrase is not defined in the insurance contract in which it appears, it has no "usual and ordinarily accepted meaning"²⁰ and it is not defined in any relevant case law.

Despite these factors, Judge Cornaby did not find the

¹⁹ Ruling on Motion for Summary Judgment at 2 (R. 88).

²⁰ Bergera v. Ideal National Life Insurance Co., 524 P.2d 599, 601 (Utah 1974).

phrase ambiguous. Instead, he looked to the judicial interpretation given the phrase by the courts of the State of Oregon, determined that that interpretation is relevant and applied the interpretation to the facts of this case.²¹ In doing so, he committed two errors. First, he erred in not finding the phrase ambiguous at the outset. Second, he erred in his determination that the Oregon interpretation is relevant and applicable.

A. "Material Contributing Cause," as a Phrase, is Inherently Ambiguous.

In Auto Leasing Company v. Central Mutual Insurance Co., 7 Utah 2d 336, 325 P.2d 264 (1958), this court established the following as the test for ambiguity in an insurance policy provision:

The test to be applied is: would the meaning be plain to a person of ordinary intelligence and understanding, viewing the matter fairly and reasonably, in accordance with the usual and natural meaning of the words, and in light of the existing circumstances, including the purpose of the policy.²²

As applied to the phrase at issue, the test indicates ambiguity for several reasons. First, because "reasonable

²¹ Ruling on Motion for Summary Judgment at 2-3 (R. 88-89).

²² Auto Leasing Company v. Central Mutual Insurance Co., 325 P.2d at 266.

minds may differ as to the meaning"²³ of the phrase, by definition its meaning cannot be "plain to a person of ordinary intelligence." The problem stems from the use of the word "material." Webster's Dictionary defines "material" as "having real importance or great consequences."²⁴ Applying this definition, one notes that the phrase embodies a subjective value determination. The question becomes whether Sandra Draughon's kidney disease was an "important" contributing cause of her death, a question on which reasonable minds may differ.

For example, one might argue, as does Mr. Draughon, that Mrs. Draughon's kidney disease was not an important contributing cause of her death because there is no medical causal connection between her kidney disease and her death. On the other hand, one might argue, as does CUNA, that Mrs. Draughon's kidney disease was an important contributing cause of her death because but for her kidney disease she would not have experienced the events that led to her death. In other words, the meaning of the phrase and its application to the facts is dependent on the subjective determination of importance made by the person analyzing the issue. It is this subjective element that prevents the meaning of the

²³ Id.

²⁴ Webster's New Collegiate Dictionary (5th Ed. 1977).

phrase from being "plain" to the hypothetical, objective "person of ordinary intelligence."²⁵

In addition, the unqualified use of the word "cause" complicates the meaning of the phrase. Webster's Dictionary defines "cause" as "something that brings about a result."²⁶ In the context of the insurance contract, the use of the word without qualification raises the question of whether "cause" means anything that brings about a result or whether it refers only to medical or physiological factors that bring about a result. Arguably, the language of the exclusionary provision contemplates that "cause" includes only medical factors.²⁷ That there is room for argument, however, points out the ambiguous nature of the phrase and the futility of trying to determine its "plain" meaning.

In short, the Auto Leasing Company test exposes the

²⁵ Aside from the additional ambiguity the subjective element supplies, it is objectionable because coverage under the insurance contract should not depend on defendant's subjective determination of materiality. Finding the phrase ambiguous and construing it in favor of plaintiff should cause defendant to rewrite its exclusionary provision to provide objective parameters within which claims such as plaintiff's can be properly assessed.

²⁶ Webster's New Collegiate Dictionary (5th Ed. 1977).

²⁷ The exclusionary provision provides: "No benefit is provided for any loss if any material contributing cause of loss was from sickness or injury which first became manifest" See Ruling on Motion for Summary Judgment at 2 (R. 88).

essential ambiguity of the phrase at issue. A reasonable, objective person of ordinary intelligence would not say that its meaning is "plain." Accordingly, the phrase should have been construed strictly against the insurer, CUNA. As stated by this Court:

In interpreting insurance policies, we have held that ambiguities are to be construed against the insurer and that words are to be given their ordinary meaning. An insured is entitled to the broadest protection he could have reasonably understood to be provided by the policy.²⁸

Judge Cornaby erred in failing to recognize the ambiguity and construe the phrase against CUNA.

B. The Oregon Interpretation of the Phrase is Inapplicable.

Judge Cornaby ostensibly applied a Court of Appeals of Oregon interpretation of the phrase to arrive at his decision in the present matter.²⁹ Application of this interpretation is erroneous for two reasons. First, the Oregon interpretation is irrelevant in the present context. The Oregon courts have developed the phrase and its body of defining principles as a judicial elucidation of certain

²⁸ Fuller v. Director of Finance, 694 P.2d 1045 (Utah 1985).

²⁹ See Ruling on Motion for Summary Judgment at 2 (R. 88).

language found in an Oregon workers' compensation statute.³⁰ The Oregon interpretation, therefore, is colored by the statutory context in which it developed and the peculiar facts of the workers' compensation claims in which it arose.

Specifically, the phrase is applied by the Oregon Courts only when a certain set of facts give rise to a claim under Or. Rev. Stat. § 656.273(1).³¹ Those facts are: (1) a claimant has suffered an off-the-job injury (2) that operates to aggravate an earlier, compensated on-the-job injury (3) to the same part of the body.³² When these particular facts are present, the issue is whether the earlier, compensated injury is a "material contributing cause" of the aggravation.³³

Even assuming the relevancy of the Oregon interpretation in an abstract sense, the facts of this case do not fit the pattern that triggers the Oregon application of the phrase.

³⁰ See Taafe v. SAIF, 77 Or. App. 492, 713 P.2d 680 (1986); Grable v. Weyerhaeuser Co., 291 Or. 387, 631 P.2d 768 (1981); Peterson v. Eugene F. Burrill Lumber, 294 Or. 537, 660 P.2d 1058 (1983). The relevant statute, Or. Rev. Stat. § 656.273(1), provides: "After the last award or arrangement of compensation, an injured worker is entitled to additional compensation, including medical services, for worsened conditions resulting from the original injury."

³¹ See Footnote 30.

³² See Grable, 291 Or. at 400-01, 631 P.2d at 776; also see Manous v. Argonaut Insurance, 79 Or. App. 645, 719 P.2d 1318 (1986).

³³ Id.

Mrs. Draughon's death did not result from an aggravation of her kidney disease, nor did it result from injury to the same part of the body as that injured by the kidney disease. In short, the Oregon interpretation of the phrase is inapplicable.

Second, the application of the Oregon interpretation was erroneous because the parties did not intend that the phrase be given such an interpretation. In Union Pacific Railroad Co. v. El Paso Natural Gas Co., 17 Utah 2d 255, 408 P.2d 910 (1965), this court stated that "in resolving a dispute about the interpretation of provisions in a contract the objective is to determine what the parties intended at the time it was executed."³⁴ Judge Cornaby failed to meet this objective. Instead, he used, without alteration or qualification, an interpretation of the phrase that neither party contemplated. In applying the contextually incongruous Oregon interpretation, and in doing so without consideration for the intentions of the parties, Judge Cornaby committed error.

³⁴ Union Pacific Railroad Co., v. El Paso Natural Gas Co., 408 P.2d at 913.

POINT III

IF THE OREGON INTERPRETATION OF THE PHRASE "MATERIAL CONTRIBUTING CAUSE" IS PROPERLY CONSTRUED AND APPLIED TO THE PRESENT FACTS, MRS. DRAUGHON'S KIDNEY DISEASE WAS NOT A "MATERIAL CONTRIBUTING CAUSE" OF HER DEATH.

Notwithstanding the inapplicability of the Oregon interpretation, if properly construed and applied it would have yielded a result in favor of Mr. Draughon. Simply put, this is because under the Oregon interpretation proof of "material contributing cause" requires proof of medical cause, and there is no evidence of a medical causal connection between Mrs. Draughon's kidney disease and her death.

The causal connection that does exist, a simple "but for" relation, served as a basis for Judge Cornaby's ruling that Mrs. Draughon's kidney disease was a "material contributing cause" of her death. Therefore, although ostensibly applying the Oregon interpretation, Judge Cornaby reached a result opposite of what should have been reached under that interpretation.

Judge Cornaby's analysis of the Oregon interpretation of the phrase, and his application of that interpretation to the facts of the case consists entirely of the following:

This phrase has not been interpreted by a

Utah court before and there is little precedent in other jurisdictions on this exact issue. The Appeals Court of Oregon addressed the issue in *Manous vs. Argonaut Insurance*, 79 Or. App. 645, 719 P.2d 1318 (1986). This case interpreted the phrase "material contributing cause" in light of Oregon's workmen's compensation law. Under this law, the employee has the burden of proving that an original injury is a "material contributing cause" of a present compensable injury. The court stated that "a compensable injury need not be the sole or principle cause of claimant's worsened condition," it need only be a material cause. *id.* at 1320. Although other intervening forces act upon the original condition, the original condition is a material contributing factor of the final injury.

Applying this interpretation to the present facts, kidney disease was a "material contributing cause" of Mrs. Draughon's death. If not for her kidney disease, Mrs. Draughon would not have elected to undergo a kidney transplant. If she had not had the kidney transplant, she would not have been given steroid drugs which caused acute pancreatitis, which ultimately caused her death. The original condition was kidney disease, which was a material factor in causing her death.³⁵

This "but for" causation analysis amounts to a misconstruction and misapplication of the Oregon interpretation of the phrase. Both the misconstruction and misapplication were prejudicial to plaintiff's case because

³⁵ Ruling on Motion for Summary Judgment at 2-3 (R. 88-89).

they served as the basis upon which Judge Cornaby ruled against plaintiff.³⁶

A. Oregon Interpretation.

The essential feature of the Oregon interpretation of the phrase overlooked by Judge Cornaby is that under the Oregon interpretation, satisfaction of the causation element requires proof of medical cause. In other words, an original, compensated injury can only be a "material contributing cause" of a subsequent off-the-job injury if a medical causal connection exists between the two. Thus, in Christensen v. State Accident Insurance Fund, 27 Or. App. 595, 557 P.2d 48 (1976), the court stated: "The issue in cases involving the range of compensable consequences flowing from a primary injury is nearly exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications."³⁷

This feature of the Oregon interpretation is illustrated by the Oregon courts' reliance on medical testimony to

³⁶ Id. at 3 (R. 89).

³⁷ Id. at 50. Note that in Grable v. Weyerhaeuser, 291 Or. 387, 631 P.2d 768 (1981), one party argued that because the Christensen court did not use the phrase "material contributing cause" in its decision, it had adopted a rule of law that conflicted with earlier cases applying the "material contributing cause" standard. In dismissing the argument, the Grable court explained the apparent inconsistency and showed that, in effect, the Christensen court did apply the "material contributing cause" standard. 631 P.2d at 776.

establish "material contributing cause." For example, in Coddington v. SAIF, 68 Or. App. 439, 681 P.2d 799 (1984), the court concluded with the following statement: "We find from the medical testimony that the January, 1981, incident was a material contributing cause of the herniation."³⁸ Likewise, the court in Christensen concluded: "We think that in this case the claimant has produced the requisite medical evidence sufficient to establish the causal connection between his present condition and the 1972 injury."³⁹ It is the medical causal connection, shown through evidence of physiological cause and effect, that establishes "material contributing cause" under the Oregon interpretation.

Likewise, the lack of a medical causal connection, shown through evidence of no physiological cause and effect, requires a finding of no "material contributing cause" under the Oregon interpretation. Thus, as noted above, Dr. Border identified the administration of steroid drugs as the first link in the physiological chain of causation leading to Mrs. Draughon's death.⁴⁰ The kidney disease and transplantation were events or circumstances that set the stage for the later

³⁸ 681 P.2d at 802.

³⁹ 557 P.2d at 50; See also Manous, 79 Or. App. 645, 719 P.2d 1318 (1986).

⁴⁰ See argument at 12, *supra*.

terminal events, but otherwise lack a causal connection to those events. Accordingly, under the Oregon interpretation of the phrase, the interpretation ostensibly applied by Judge Cornaby, Mrs. Draughon's kidney disease was not a "material contributing cause" of her death.

B. Judge Cornaby's Construction and Application.

In his construction and application of the Oregon interpretation of the phrase, Judge Cornaby failed to recognize the medical causation element. According to Judge Cornaby, Mrs. Draughon's kidney disease was a "material contributing cause" of her death because of the following "but for" causation sequence:

If not for her kidney disease, Mrs. Draughon would not have elected to undergo a kidney transplant. If she had not had the kidney transplant, she would not have been given steroid drugs which caused acute pancreatitis, which ultimately caused her death.⁴¹

According to the Oregon interpretation, the first two events of the sequence noted by Judge Cornaby could not be material contributing causes of death because they lack the necessary causal connection. Taking the parts of the sequence one at a time, Judge Cornaby first states: "If not

⁴¹ Ruling on Motion for Summary Judgment at 3 (R. 89). Interestingly, only upon reaching the third "link" in his sequence - "steroid drugs which caused acute pancreatitis"- does Judge Cornaby begin to use the word "cause" in his description of the sequence.

for her kidney disease, Mrs. Draughon would not have elected to undergo a kidney transplant."⁴² There is no medically indicated causal connection, no physiological cause and effect relation, between Mrs. Draughon's kidney disease and her decision to have a transplantation. Her kidney disease did not operate physiologically to cause her decision to have a transplantation.⁴³ Her decision was caused by an independent act of volition. The causal connection identified by Judge Cornaby, a simple "but for" relation, is insufficient to establish "material contributing cause" under the Oregon interpretation.

The second part of Judge Cornaby's sequence suffers from the same problem - a factor other than an active physiological cause produces the effect. Judge Cornaby states: "If she had not had the kidney transplant, she would not have been given steroid drugs"⁴⁴ Again, the "but for" causal relation is apparent. It is nonsensical, however, to say that the transplantation "caused" the administration of steroid drugs in the causal sense recognized by the Oregon courts as that necessary to establish "material contributing cause."

⁴² Id.

⁴³ Affidavit of Dr. Wayne A. Border ¶ 9 (R. 28).

⁴⁴ Ruling on Motion for Summary Judgment at 3 (R. 89).

That Judge Cornaby did not recognize the lack of a physiological cause and effect relation in the present matter is somewhat confusing in light of the fact that he did recognize the relation in the following supposed analogies: "As a practical matter, patients do not die from their underlying illness; arteriosclerosis victims die of cardiac arrest and AIDS victims die of pneumonia, yet in those cases, the common perception of the resulting death is the underlying disease."⁴⁵ In other words, although a perceived cause of death may be a certain event, often an underlying disease can also be correctly termed a "cause" of death because of a direct physiological causal link between the underlying disease and the event.⁴⁶

Although Judge Cornaby stated that this situation is analogous to the sequence of events leading to Mrs. Draughon's death, the analogy only holds true if one begins the sequence with Mrs. Draughon's pancreatitis. That is, although the pancreatitis was the "common perception of the resulting death," Mrs. Draughon died of cardiac arrest.⁴⁷

⁴⁵ Id.

⁴⁶ For example, the underlying disease arteriosclerosis causes a thickening and hardening of arterial walls, which in turn causes restricted and, eventually, blocked circulation, which in turn causes the event cardiac arrest.

⁴⁷ Deposition transcript of Dr. Wayne A. Border at 31.

The analogy fails if the sequence begins with Mrs. Draughon's kidney disease because of the lack of physiological causation.

In short, the lack of physiological causation compels the conclusion that Mrs. Draughon's kidney disease was not a "material contributing cause" of her death. In reaching the opposite result, Judge Cornaby misconstrued and misapplied the Oregon interpretation and thereby erred.

CONCLUSION

The sole issue before Judge Cornaby was whether Sandra Draughon's kidney disease was a "material contributing cause" of her death. The analysis necessary to decide the issue had two facets - the determination of the meaning of the phrase and the application of that meaning to the facts.

In determining that an Oregon interpretation of the phrase provided the relevant meaning, Judge Cornaby implicitly decided that the phrase is not ambiguous. Mr. Draughon assigns its first error to this decision. Lacking any relevant definition, the phrase should have been found ambiguous and, pursuant to the rules of construction, it should have been construed against its drafter, CUNA. Mr. Draughon requests that this court reverse Judge Cornaby's ruling dated April 9, 1987, on the grounds that the phrase is ambiguous and should have been construed in favor of Mr.

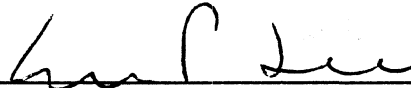
Draughon pursuant to the construction urged below and on appeal.

Mr. Draughon next assigns error to Judge Cornaby's decision to apply the Oregon interpretation of the phrase to the facts of this case. The legal and factual setting of the present matter does not conform with that in which the Oregon courts apply the phrase. Furthermore, the parties did not intend that the phrase be construed according to an Oregon interpretation. Mr. Draughon requests that this court find the Oregon interpretation inapplicable and, on that basis, reverse Judge Cornaby's ruling dated April 9, 1987.

Mr. Draughon's third assignment of error involves the construction of the Oregon interpretation by Judge Cornaby and the application of that construction to the facts. Judge Cornaby failed to perceive the nature of the causal connection essential to the Oregon interpretation of the phrase. As a result, he misconstrued the Oregon interpretation and misapplied it to the facts. Assuming this court finds the Oregon interpretation applicable, Mr. Draughon requests (1) that it find that properly construed and applied, the Oregon interpretation mandates a finding in his favor; and that (2) on the basis of its misconstruction and application, Judge Cornaby committed reversible error.

DATED: August 26, 1987.

DART, ADAMSON & KASTING

A handwritten signature in dark ink, appearing to read "Eric P. Lee", is written over a horizontal line.

Craig G. Adamson

Eric P. Lee

Attorneys for Plaintiff/
Appellant

CERTIFICATE OF HAND DELIVERY

I hereby certify that I caused four true and correct copies of the foregoing Brief of Appellant to be hand delivered to the following counsel of record this 26th day of August, 1987:

Lewis B. Quigley
BAYLE, HANSON, NELSON & CHIPMAN
Attorneys for Defendant-Respondent
Continental Bank Building
Suite 1300
Salt Lake City, Utah 84101



ADDENDUM

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In the District Court of the Second Judicial District

IN AND FOR THE

County of Davis, State of Utah

FILED IN CLERK'S OFFICE
COUNTY OF DAVIS, UTAH

1987 APR 10 PM 3:55

RECORDED & INDEXED
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2ND DISTRICT COURT

BY AB
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RON DRAUGHON,

)

Plaintiff,

)

RULING ON MOTION

FOR SUMMARY JUDGMENT

vs.

)

CUNA MUTUAL INSURANCE SOCIETY,

)

Civil No. 39545

Defendant.

)

The plaintiff's and defendant's motions for summary judgment came before the Court on March 31, 1987. The plaintiff was represented by Craig G. Adamson and the defendant was represented by Lewis B. Quigley. After oral argument, the Court took the motions under advisement. The court now rules on the motions for summary judgment.

The material facts in this matter are undisputed. Mrs. Sandra Draughon suffered from kidney disease first diagnosed in 1982. The condition was successfully treated with maintenance hemodialysis and, aside from normal side effects of the hemodialysis, Mrs. Draughon led a normal, productive life.

In October of 1985, the plaintiff and Mrs. Draughon, now deceased, entered into a loan agreement under which they borrowed funds to purchase an automobile through America First Credit Union in Ogden, Utah. As part of that transaction the America First Credit Union obtained credit life insurance from defendant CUNA Mutual Insurance Society for the benefit of the plaintiff and his wife.

In November of 1985, Mrs. Draughon elected to undergo a kidney transplant operation, which if successful, would allow her to live free of hemodialysis and its side effects. Complications

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arose following the operation, requiring Mrs. Draughon to remain hospitalized until her death on February 7, 1987. She developed acute pancreatitis, resulting from steroid drugs required as an immunosuppressive. Pancreatitis is a rare and uncommon, infrequent complication of taking steroids and was not a foreseen complication of which Mrs. Draughon was advised prior to undergoing surgery, yet was the ultimate cause of her death.

Plaintiff submitted a claim to CUNA Mutual Insurance Society under the life insurance policy obtained as described above. Defendant denied the claim, stating that the death of Sandra L. Draughon came under the "risks not assumed" clause of the policy.

Given these undisputed facts, the legal issue remains: Whether Mrs. Draughon's death resulted from factors which fall within the "risks not assumed" clause of the insurance policy. The clause states, in pertinent part:

CUNA Mutual does not assume the risk and no benefit is provided for any loss if any material contributing cause of loss was from sickness or injury which first became manifest prior to the time insurance coverage was otherwise effective under the Contract.

Interpreting this clause in light of the facts requires that the Court determine whether Mrs. Draughon's kidney disease, which existed at the effective date of the insurance contract, was a "material contributing cause" of her death.

This phrase has not been interpreted by a Utah Court before and there is little precedent in other jurisdictions on this exact issue. The Appeals Court of Oregon addressed the issue in *Manous vs. Argonaut Insurance*, 79 Or.App. 645, 719 P.2d 1318 (1986). This case interpreted the phrase "material contributing cause" in light of Oregon's workmen's compensation law. Under this law, the employee has the burden of proving that an original injury is a "material contributing cause" of a present compensable injury. The court stated that "a compensable injury need not be the sole or principal cause of claimant's worsened

condition," it need only be a material cause. id. at 1320. Although other intervening forces act upon the original condition, the original condition is a material contributing factor of the final injury.

Applying this interpretation to the present facts, kidney disease was a "material contributing cause" of Mrs. Draughon's death. If not for her kidney disease, Mrs. Draughon would not have elected to undergo a kidney transplant. If she had not had the kidney transplant, she would not have been given steroid drugs which caused acute pancreatitis, which ultimately caused her death. The original condition was kidney disease, which was a material factor in causing her death.

Acute pancreatitis resulting from a kidney transplant cannot be equated with intervening factors such as an automobile striking a cancer patient walking to the hospital to receive radiation therapy. In such a case, it is clear that the cancer would not be a "material contributing cause" of the patient's death.

As a practical matter, patients often do not die from their underlying illness; arteriosclerosis victims die of cardiac arrest and AIDS victims die of pneumonia, yet in those cases, the common perception of the resulting death is the underlying disease.

The Utah Supreme Court, in *Fuller vs. Director of Finance*, 694 p.2d 1045 (Utah 1985), stated:

In interpreting insurance policies, we have held that ambiguities are to be construed against the insurer and that words are to be given their ordinary meaning. An insured is entitled to the broadest protection reasonably understood to be provided by the policy.

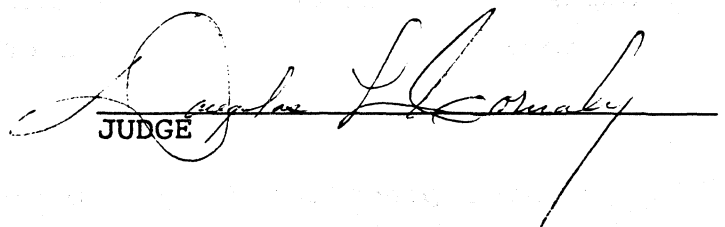
The plaintiff and his now deceased wife entered into the life insurance contract less than one month prior to Mrs. Draughon's kidney transplant, which she had been considering for some time. It seems reasonable that upon interpreting the "risks

not assumed" clause, the plaintiff reasonably understood that it included Mrs. Draughon's kidney disease and any complications arising out of a transplant operation related to that disease. The ordinary meaning of the phrase "material contributing cause" has been applied to the facts underlying the plaintiff's claim, which CUNA Mutual Insurance Society properly denied.

No genuine issues of material fact exist, therefore, pursuant to Rule 56 of Utah Rules of Civil Procedure, defendant's motion for judgment is granted. Plaintiff's motion for summary judgment is denied.

Dated April 9, 1987.

BY THE COURT:


JUDGE

Certificate of Mailing:

This is to certify that the undersigned mailed a true and correct copy of the foregoing Ruling to Craig G. Adamson, 310 South Main, Suite 1330, Salt Lake City, Utah 84101 and Lewis B. Quigley, Suite 133 Continental Bank Building, Salt Lake City, Utah 84101 on April 10, 1987.


Deputy Clerk

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DAVIS COUNTY, UTAH

1987 JAN 12 PM 2:30

MICHAEL G. ALLPHIN, CLERK
2ND DISTRICT COURT

BY AB
DEPUTY CLERK

Craig G. Adamson
Eric P. Lee
Attorneys for Plaintiff
310 South Main, Suite 1330
Salt Lake City, Utah 84101
Telephone: (801) 521-6383

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR DAVIS COUNTY, STATE OF UTAH

---oooOooo---

RON DRAUGHON,	:	
	:	AFFIDAVIT OF DR.
Plaintiff,	:	WAYNE A. BORDER
	:	
v.	:	
	:	Civil No. 39545
CUNA MUTUAL INSURANCE SOCIETY,:	:	
Defendant.	:	

---oooOooo---

STATE OF UTAH)
 : ss
COUNTY OF SALT LAKE)

Dr. Wayne A. Border, being first duly sworn upon oath,
deposes and states:

1. I have personal knowledge of all facts stated in this
affidavit.

2. I am Chief of the Division of Nephrology and
Hypertension at the University of Utah Medical Center.

3. I was Sandra L. Draughon's last attending physician
before her death on February 7, 1986. Dr. Martin C. Gregory was
her attending physician at the time of death.

4. Mrs. Draughon suffered from chronic renal failure due to

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reflux nephropathy (kidney disease) first diagnosed in September of 1982.

5. This condition was successfully treated with maintenance hemodialysis. In fact, Mrs. Draughon did remarkably well on hemodialysis and lead a normal, productive life including full employment. She could have continued with this treatment indefinitely.

6. In November of 1985, Mrs. Draughon elected to undergo a kidney transplant operation. The operation was successfully performed on November 21, 1985.

7. Following the operation, Mrs. Draughon developed acute pancreatitis, an unusual complication of kidney transplant operations and immunosuppressive treatment. Ultimately, this complication, not her kidney disease, caused Mrs. Draughon's death.

8. The pancreatitis developed by Mrs. Draughon was in no way related to her kidney disease.

9. Mrs. Draughon's decision to undergo a kidney transplantation was purely elective and not necessitated by the presence of kidney disease. Thus, her death caused by pancreatitis following the surgery was in no way connected with her pre-existing condition.

DATED this 30 day of December, 1986.

Wayne A. Border
Wayne A. Border, M.D.

SUBSCRIBED AND SWORN to before me this 30th day of
December, 1986.

R. P. Walgren
Notary Public
Residing at: Salt Lake City, Utah

My Commission Expires:

August 20, 1989

draughon.aff

Lewis B. Quigley, USB No. 2669
Matthew J. Storey, USB No. 4678
BAYLE, HANSON, NELSON & CHIPMAN
Attorneys for Defendant
1300 Continental Bank Building
Salt Lake City, Utah 84101
Telephone: (801) 364-3627

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DAVIS COUNTY, UTAH

1987 MAR 19 PM 12:42

MICHAEL G. ALLEN, CLERK
2ND DISTRICT COURT

BY ab
CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

RON DRAUGHON, :
 :
Plaintiff, : AFFIDAVIT OF DR. ROBERT E. BOND
 :
vs. :
 :
CUNA MUTUAL INSURANCE SOCIETY, :
 : Civil No. 39545
Defendant. :
 :

STATE OF UTAH)
 : ss.
COUNTY OF _____)

Having been first duly sworn, Affiant deposes and says:

1. I am a physician licensed to practice medicine in the State of Utah, specializing in internal medicine and nephrology.

2. I presently serve as Chief of Nephrology, LDS Hospital.

3. I have reviewed the medical records of Mrs. Sandra Draughon pertaining to her kidney disease and death in February of 1986. These records contain the following information:

(a) Mrs. Draughon was a 33 year old woman with end-stage renal disease, secondary to chronic reflux pyelonephritis.

(b) She was admitted to the University of Utah Hospital on November 21, 1985, for placement of a cadaveric renal graft.

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(c) She developed acute rejection of the graft and a transplant nephrectomy was performed approximately one week after the initial transplant.

(d) An abdominal exploration at the time of the kidney transplant showed hemorrhagic pancreatitis to be present and from that time on she had multiple problems and complications secondary to infections and hemorrhagic pancreatitis that ultimately led to her death in early February of 1986.

(e) She received Prednisone in conjunction with her transplant operation.

4. Administration of Prednisone in high doses can lead to acute pancreatitis.

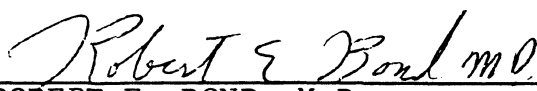
5. Pancreatitis is an uncommon, but not unknown complication associated with kidney transplantation.

6. Pancreatitis was a complication that ^{in all probability RE Bond} occurred as a result of the treatment that was done for Sandra Draughon's primary underlying renal disease.

7. Pancreatitis is an uncommon complication of kidney transplantation. Pancreatitis was a complication that in all probability occurred as a result of the treatment that was done for Sandra Draughon's primary, underlying disease.

8. It is extremely unlikely that Mrs. Draughon would have developed acute pancreatitis had not the transplant surgery been done and the transplant surgery was done because of her renal disease.

DATED this 18th day of March, 1987.


ROBERT E. BOND, M.D.

SUBSCRIBED AND SWORN TO before me by ROBERT E. BOND, M.D., this
18th day of March, 1987.

[Signature]
NOTARY PUBLIC

Residing at Salt Lake City, Utah

My Commission Expires:

3/18/90

CERTIFICATE OF MAILING

I hereby certify that on this 18th day of March, 1987, I mailed
a true and correct copy of the foregoing AFFIDAVIT OF DR. ROBERT E.
BOND, postage prepaid, to the attorney for Plaintiff:

Mr. Craig G. Adamson
DART, ADAMSON & PARKEN
310 South Main, Suite 1330
Salt Lake City, Utah 84101

Kathleen Hedlin